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Supreme Court, U.S.
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In the
Supreme Court of the United States

October Term, 1970
No. ~~486~~ 70-152

Minneapolis Federation of Teachers, Local No. 59

Petitioner

vs.

Douglas M. Head, Attorney General, State of Minnesota; Keith W. Davidson, Katherine V. Howard, Harvey A. Ring and Betty K. Robb, on behalf of themselves and all other Taxpayers and Residents of Special School District No. 1 of the City of Minneapolis; Special School District No. 1 and its Board of Education; City of Minneapolis Education Association; and John Doe

Respondents

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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INTRODUCTION

Petitioner files this supplemental brief pursuant to Supreme Court Rule 24 (5). An interesting facet of our Petition is presently developing in the courts of Pennsylvania and in the courts of Illinois. Petitioner's attention was first directed to these matters by an article in Business Week Magazine, May 22, 1971.

In Pennsylvania an action was brought by the American Federation of State, County and Municipal Employees after "political lay-offs" of 3,500 low-level Republican highway maintenance workers in order to fill those vacancies with registered Democrats. A lower Pennsylvania court issued a preliminary injunction forbidding further political firings and ordered that any newly hired worker be a previously laid-off Republican, and that no additional employees be fired except for cause, with the reasons issued in writing and the discharged employee given a hearing. The union argues that the patronage system with regard to non-policymaking employees, violates the first amendment. Contrast the generally recognized authority of an administration to pick the people it wants in policymaking jobs. The state, on the other hand, argues that the union is attempting to create a civil service where there is none now.

A similar suit is also pending in a Federal Court in Springfield, Illinois.

It seems clear that the unconstitutional conditions doctrine prevents political discharge of the Pennsylvania highway maintenance

workers. 81 Harvard L. R. 1439. This doctrine provides public employees with protection from unconstitutional discrimination. But the distinctive element in the Pennsylvania situation as with the situation of Petitioners is the uncontrolled "mass dismissal". By its very nature, the mass dismissal situation encourages determinations based on individual prejudices. Justification for actions can be found in allegations of otherwise permissible reasons and they will be almost impossible to disprove. Whenever the dismissing body has authority to pick and choose those who will suffer dismissal, and when a large number of employees are dismissed, then there should be careful investigation of the circumstances to determine whether unconstitutional management discrimination accounted for any of the dismissals. This is particularly necessary where the dismissing body acts without a hearing and statement of findings.

In Minneapolis, there was possible discrimination between teacher groups when the School Board determined that certain members, of a teacher organization with which the School Board was currently compatible, were not striking. On the other hand, members of the more liberal teacher group were treated as strikers for engaging in substantially similar activity. This was done by selecting April 10, 1970 as the date to determine strike status as opposed to April 9, 1970, when the teachers were first absent from work. The discrimination could just as easily have taken other forms. For example, the Board could have terminated only those

teachers in inner-city schools where conflicts with teachers were running high, or it could have terminated only teachers who were nearing the top of their pay scale, or it could have terminated for any number of discriminatory, impermissible reasons.

An alleged striker can, of course, request a hearing to establish that he was not on strike, but it would be irrelevant that others who had engaged in substantially similar activity had not been terminated. Therefore, where the teacher's burden of proof must be met by subjective evidence (i.e.-testimony as to his intent in absenting himself from school), and where he feels the real reason for labelling him a striker was discriminatory (also subjective testimony), he is faced with a substantial burden of proof which in all likelihood will sound like 'sour grapes' and will be rejected. We believe that public employees have the right to a hearing and findings which protect them from an arbitrary, discriminatory determination of strike status. This is not provided by Minnesota law, in fact the opposite is encouraged and fostered. Yet the courts are constantly moving closer to requiring the employer to show cause <u>before</u> dismissing large numbers of such employees. There should almost be a presumption of unconstitutional action where mass dismissals are concerned.

> Any statute providing for, or reasonably contemplating, dismissal of large numbers of public employees (mass dismissals), for violation of some statute or conditions of employment, must

provide for pre-termination hearings or be adjudged unconstitutional on its face, because such statutes provoke 'anonymous' discrimination by those representing management, and such statutes are not reasonably oriented to determine whether individuals within the dismissed group did in fact violate the statutes or some condition of employment, or should otherwise be dismissed.

Minnesota Statute 179.54 is such a statute. There is no guidance in this statute as to who shall make the determination of violation of Section 179.51. Nor is there any guidance or procedure to determine which, if any, employees violated the statute. Possibly Petitioner's members were determined to be strikers on the basis of their organizational affiliation. It is almpst impossible to establish such discrimination after the fact. The only way to prevent it is to preclude the opportunity.

Respectfully submitted,

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In the
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October Term, 1970
No. ~~1686~~

Minneapolis Federation of Teachers, Local No. 59

Petitioner

v.s.

Douglas M. Head, Attorney General, State of Minnesota; Keith W. Davidson, Katherine V. Howard, Harvey A. Ring and Betty K. Robb, on behalf of themselves and all other Taxpayers and Residents of Special School District No. 1 of the City of Minneapolis; Special School District No. 1 and its Board of Education; City of Minneapolis Education Association; and John Doe

Respondents

SECOND SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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Petitioner files this supplemental brief pursuant to Supreme Court Rule 24 (5).

On June 23, 1971, in Goldberg v. Cincinnati, 26 Ohio St. 2d ___, the Supreme Court of Ohio was presented with a case almost identical on the facts to that of Petitioner's herein. The major issue presented to that Court was whether the Ohio no strike law, the Ferguson Act, was self-executing. That is, were the public employees who struck thereby automatically terminated and subject to the statutory penalties.

The Ferguson Act, Ohio R. C. 4117.01 et. seq. is substantially the same as the Minnesota No Strike Law except for the following provision in R.C. 4117.04, which provides:

> "Any public employee who, (strikes) is on strike, provided that notice that he is on strike shall be sent to such employee by his superior by mail addressed to his residence as set forth in his employment record. . . ." (emphasis ours)

The Ohio Court held that where such notice was not sent there was no strike under the Ferguson Act and the provisions in that act were not effectuated.

> "It must be emphasized that R.C. 4117.04 expressly contemplates actual written notice to each employee that he is on strike. There is good reason for strict compliance with this condition. Even in the case of employees who are reinstated, the effects of their violation of the Ferguson Act

are severe and continue in force for as long as two years after reinstatement." Goldberg v. Cincinnati, supra.

In other words, the Court was emphasizing the due process importance of notice, in order to impose penalties of the type contemplated in the no strike law. The notice problem in Minnesota is more acute. There is no provision for notice under the Minnesota Statute. It has been assumed that the Statute is self-executing. The Ohio Court rejected that conclusion both on the basis of the statutory construction and on principle. The penalties are too severe to allow anything other than strict due process protections.

Minnesota Statute 179.56 requires the employee to file a request for hearing "within ten days after regular compensation of such employee has ceased", but there is no requirement for notice to the employee and it is unclear when that ten day period begins.

Respectfully submitted,

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